

2-29-2016

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43357
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR 2015-513
v.)	
)	
SCOTT JEFFERY SAMS,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE LYNN G NORTON
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Mr. Sams was charged with felony aggravated assault and use of a deadly weapon in the commission of a crime. Following his jury trial, a jury found Mr. Sams guilty of the lesser-included offense of misdemeanor disturbing the peace. On appeal, Mr. Sams asserts the district court abused its discretion when it admitted evidence of a standoff between Mr. Sams and police that occurred after the alleged incident at issue. The standoff evidence was Idaho Rule of Evidence 404(b) (“Rule 404(b)”) evidence of other acts, and was inadmissible because the State failed to serve notice. The district court admitted the evidence on the basis it was not Rule 404(b) evidence, but the court had earlier ruled the standoff was Rule 404(b) evidence.

Statement of the Facts and Course of Proceedings

The State charged Mr. Sams by Information with aggravated assault, felony, in violation of Idaho Code §§ 18-901(b) and 18-905(a), and use of a deadly weapon in the commission of a crime, felony, in violation of I.C. § 19-2520. (R., pp.30-31.) Mr. Sams entered a not guilty plea to the charges. (R., p.33.)

Mr. Sams exercised his right to a jury trial. (See R., pp.118-24, 126-29.) At Mr. Sams’ jury trial, the following facts were adduced. Mr. Sams and Travis Ohlsson had known each other for a few years (Tr., p.128, L.24 – p.129, L.3, p.262, L.24 – p.263, L.10), and they arranged using the app Grindr that Mr. Ohlsson would spend a weekend at Mr. Sams’ residence. (Tr., p.156, L.3 – p.157, L.9, p.262, L.13 – p.264, L.4, p.268, L.25 – p.269, L.9.) Mr. Sams testified that he expected they would have sex (Tr., p.269, Ls.10-12), but Mr. Ohlsson testified he asked to hang out and needed a

place to stay. (Tr., p.157, Ls.10-17.) Mr. Sams testified he and Mr. Ohlsson had sex and got high after Mr. Ohlsson arrived at the house. (Tr., p.269, Ls.13-24.) While Mr. Ohlsson testified he did not have any sexual contact with Mr. Sams (Tr., p.159, Ls.8-12), Officer Andrew Linn of the Boise Police Department testified Mr. Ohlsson told him there was some sexual contact. (Tr., p.227, L.22 – p.228, L.8.) Mr. Sams further testified that the morning of the following Monday, he awoke to Mr. Ohlsson sexually penetrating him. (Tr., p.274, L.5 – p.275, L.17.)

Later that morning, Mr. Sams noticed the box of his HIV medication had gone missing from his bedroom. (Tr., p.277, Ls.8-22.) Mr. Sams testified he confronted Mr. Ohlsson about the missing pills, Mr. Ohlsson denied everything, and the two began to argue. (Tr., p.282, L.25 – p.283, L.6.) Mr. Ohlsson stripped naked to show he did not take anything, and then Mr. Ohlsson turned violent and began to shake Mr. Sams and push him around. (Tr., p.284, L.20 – p.286, L.12.) While Mr. Ohlsson was shaking and hitting him, Mr. Sams grabbed his show knife off a shelf. (Tr., p.286, L.15 – p.287, L.25.) Mr. Sams told Mr. Ohlsson to get out of his house and give his stuff back. (Tr., p.288, Ls.1-4.) Mr. Ohlsson then attacked Mr. Sams, and the two struggled over the knife. (Tr., p.288, Ls.5-12.) Mr. Sams screamed for help. (Tr., p.288, Ls.17-18.) Mr. Ohlsson took control of the knife and held it to Mr. Sams' chin, causing an injury. (Tr., p.288, L.22 – p.289, L.7.)

Mr. Ohlsson provided a different account of the incident. Mr. Ohlsson testified Mr. Sams accused him of stealing the pills, but Mr. Ohlsson did not steal the pills and was unaware they were in the house. (Tr., p.133, L.24 – p.135, L.3.) Mr. Sams became agitated, and after Mr. Ohlsson offered to help find the pills, he noticed

Mr. Sams had a knife in his hand. (Tr., p.135, L.4 – p.136, L.2, p.136, Ls.22-25.) Mr. Sams continued to accuse Mr. Ohlsson of stealing the pills and stated he would gut Mr. Ohlsson like a pig. (Tr., p.136, Ls.3-21.) Mr. Sams then told Mr. Ohlsson to strip naked, and Mr. Ohlsson complied. (Tr., p.137, L.6 – p.138, L.8.) Mr. Sams threatened to kill Mr. Ohlsson (Tr., p.139, Ls.4-8), and then lunged at Mr. Ohlsson with the knife. (Tr., p.140, Ls.13-15.) Mr. Ohlsson tried to get the knife away from Mr. Sams, and after he got it, Mr. Sams started screaming for help. (Tr., p.140, L.15 – p.141, L.10.) Mr. Ohlsson later noticed he had a cut on his arm and some scratches. (Tr., p.146, Ls.4-11.)

Mr. Sams and Mr. Ohlsson left the bedroom, and Mr. Ohlsson left the house through the front door while Mr. Sams went to the garage to get a shovel. (Tr., p.141, L.8 – p.142, L.17, p.293, L.16 – p.294, L.18.) Mr. Sams subsequently threw Mr. Ohlsson's clothes out of the house. (Tr., p.146, Ls.3-9, p.294, Ls.19-25.) Mr. Sams' roommate, who had been in the living room of the house, called 911. (Tr., p.188, L.8 – p.191, L.23.) When the police arrived at the scene, they detained and questioned Mr. Ohlsson (Tr., p.150, L.5 – p.152, L.17, p.222, Ls.3-21), and walked Mr. Sams' roommate out of the house (Tr., p.192, Ls.2-6).

There was then a standoff between the police and Mr. Sams for about five hours. Before the State's opening statement, Mr. Sams requested the State not be allowed to go into the standoff with the officers, because Mr. Sams had not been charged with resisting and obstructing and evidence of the standoff was irrelevant and prejudicial. (Tr., p.109, L.22 – p.110, L.4.) The State argued the standoff was evidence of consciousness of guilt and identity. (Tr., p.110, L.16 – p.111, L.5.)

The district court initially determined sufficient facts existed to find the standoff happened. (Tr., p.113, Ls.17-19.) The district court determined the standoff could be perceived as another wrong or act under Idaho Rule of Evidence 404, and ruled under Rule 404(b) the information was admissible for a non-propensity purpose including identity or the absence of mistake or accident. (Tr., p.113, L.17 – p.114, L.2.) The district court also determined the evidence was admissible under Rule 403 because it was not unduly prejudicial to Mr. Sams. (Tr., p.114, Ls.2-3.)

Mr. Sams then brought to the district court's attention that he was entitled to notice of the standoff evidence under Rule 404(b). (See Tr., p.114, Ls.24-25.) The State argued the standoff evidence was not Rule 404(b) evidence because it was part and parcel to the incident, and it was not propensity evidence because it showed Mr. Sams was not in the right state of mind when he refused to come out and speak with law enforcement. (Tr., p.117, L.2 – p.118, L.6.) In response, Mr. Sams asserted the evidence was prejudicial and irrelevant to the incident. (Tr., p.118, Ls.7-19.)

The district court recognized the State had not provided notice of its intent to introduce Rule 404(b) evidence. (Tr., p.118, Ls.20-22.) The district court ruled evidence that Mr. Sams was anti-authoritarian and thus had a propensity to commit crimes was prohibited under Rule 404(a). (Tr., p.118, L.22 – p.119, L.1.) However, the district court determined that certain parts of the standoff showed consciousness of guilt and were parcel to the facts of the incident. (See Tr., p.119, Ls.2-5.) The district court determined the police's attempts to contact Mr. Sams during the standoff were not character or Rule 404(b) evidence requiring notice. (Tr., p.119, Ls.9-15.)

In its opening statement, the State told the jury it would hear about the time period before Mr. Sams was taken into custody. (Tr., p.127, Ls.9-10.) During the State's case-in-chief, Mr. Sams' roommate testified the police kept him away from the house for about five hours, and when he returned the house had been ransacked. (Tr., p.192, Ls.7-23.) Officer Kirk Rush testified Mr. Sams did not respond to the officers' initial attempts to contact him, but the officers eventually made contact with Mr. Sams and took him into custody when he exited the house. (Tr., p.206, L.18 – p.207, L.14.)

On direct examination, Mr. Sams testified he sent a kite out while he was in jail requesting a picture be taken of his chin, but a picture was not taken. (Tr., p.289, L.12 – p.291, L.7.) The State argued Mr. Sams thereby opened the door for inquiry into the police response and his communications with the police. (Tr., p.297, L.16 – p.298, L.3.) The district court determined Mr. Sams had opened the door to his interactions with the police, including the police's prior attempts to investigate the incident. (Tr., p.298, L.17 – p.299, L.10, p.301, Ls.2-8.)

Thus, on cross-examination, Mr. Sams testified he had locked himself in the bathroom and initially did not know the police had arrived. (Tr., p.305, Ls.16-22.) He was unaware of calls to his cell phone about half an hour into the standoff, because he had no idea where his phone was. (See Tr., p.306, Ls.14-22.) About an hour later, Mr. Sams looked outside the window and saw the police. (Tr., p.306, L.23 – p.307, L.3.) The police tried to get his attention with their PA system, and Mr. Sams subsequently went to the back door of the house and made contact with law enforcement. (Tr., p.307, Ls.4-23.) The police asked Mr. Sams to come outside several times, but he remained

inside the house. (Tr., p.307, L.24 – p.309, L.23.) At one point, the police threw a phone through a window so a negotiator could talk with Mr. Sams. (Tr., p.310, Ls.4-17.) Mr. Sams was arrested when he eventually went outside. (Tr., p.310, Ls.18-24.)

The jury acquitted Mr. Sams of felony aggravated assault and of the lesser-included offense of misdemeanor assault. (See Tr., p.380, L.20 – p.381, L.13; R., 159.) The jury found Mr. Sams guilty of the lesser-included offense of misdemeanor disturbing the peace. (Tr., p.380, L.20 – p.381, L.2; R., p.159.)

The district court sentenced Mr. Sams to 180 days jail time, with credit for 107 days served and 73 days suspended. (Tr., p.393, Ls.1-19; R., p.163.) The district court placed Mr. Sams on probation for a period of two years. (Tr., p.393, Ls.19-21; R., p.163.)

Mr. Sams filed a Notice of Appeal timely from the district court's Judgment of Conviction and Probation Order. (R., pp.168-70.)

About three months later, the State filed a Motion for Bench Warrant for Probation Violation. (R., pp.173-74.) The district court revoked probation and ordered Mr. Sams to serve the previously-suspended jail sentence. (Order Revoking Probation, Judgment of Conviction (Misdemeanor) and Commitment, Nov. 12, 2015.) The district court later approved the request by the Ada County's Sheriff's Office that Mr. Sams be granted early release time.¹ (Approval of 5 Days of Early Release, Dec. 22, 2015.)

¹ Mr. Sams is currently not on the Ada County Jail's Inmate Roster. See Inmate Roster, Ada County Sheriff's Office, <https://adasheriff.org/webapps/sheriff/reports/inmates> (last accessed Feb. 23, 2016).

ISSUE

Did the district court abuse its discretion when it admitted evidence of the standoff between Mr. Sams and the police on the basis it was not Idaho Criminal Rule 404(b) evidence, despite the court's earlier ruling the evidence was Rule 404(b) evidence?

ARGUMENT

The District Court Abused Its Discretion When It Admitted Evidence Of The Standoff On The Basis It Was Not Idaho Rule Of Evidence 404(b) Evidence, Because The Court Earlier Ruled The Standoff Evidence Was Rule 404(b) Evidence

A. Introduction

Mr. Sams asserts the district court abused its discretion when it admitted evidence of the standoff on the basis it was not Idaho Rule of Evidence 404(b) evidence, because the court earlier ruled the standoff was Rule 404(b) evidence. The district court excused the State's failure to serve notice regarding the standoff evidence under Rule 404(b) by determining the standoff evidence was not Rule 404(b) evidence. (See Tr., p.119, Ls.9-15.) However, the district court's ultimate determination that the standoff evidence was not Rule 404(b) evidence was contrary to its earlier ruling the standoff evidence was evidence of another act and relevant for non-propensity purposes under Rule 404(b). (See Tr., p.113, L.17 – p.114, L.6.)

The standoff evidence was evidence of other acts subject to the strictures of Rule 404(b). Because the State failed to serve notice, the standoff evidence was inadmissible. The district court's ultimate determination admitting the standoff evidence on the basis it was not Rule 404(b) evidence, despite the court's earlier ruling, was arbitrary and outside the boundaries of the court's discretion. Further, the State will be unable to show the district court's error was harmless beyond a reasonable doubt. Thus, Mr. Sams' judgment of conviction should be vacated and the case should be remanded to the district court.

B. Standard Of Review

An appellate court reviews a trial court's decision to admit evidence for an abuse of discretion. *State v. Grist*, 147 Idaho 49, 51 (2009). When reviewing a trial court's decision for an abuse of discretion, an appellate court conducts a multi-tiered inquiry into: (1) whether the trial court rightly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the trial court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

C. The Standoff Evidence Was Evidence Of Other Acts Subject To The Strictures Of Rule 404(b)

Mr. Sams asserts, akin to the district court's earlier ruling, that the standoff evidence was evidence of other acts subject to the strictures of Rule 404(b).

The Idaho Rules of Evidence provide that character or propensity evidence is not admissible: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." I.R.E. 404(b). However, other acts evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

The standoff evidence was evidence of other acts subject to the strictures of Rule 404(b), because the evidence did not form a factual element of the underlying charges and the standoff occurred in the hours after the incident. Contrary to the district court's later determination that "certain components of the delay in coming out of the residence,

which are consciousness of guilt are parcel to the facts of the crime” (Tr., p.118, Ls.2-5), the standoff evidence did not form a factual element of the underlying charges of aggravated assault and use of a deadly weapon in the commission of a crime. See I.C. §§ 18-901(b), 18-905, 19-2520. Section 18-901(b) defines an assault as “[a]n intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.” An aggravated assault is an assault “[w]ith a deadly weapon or instrument without intent to kill” or “[b]y any means or force likely to produce great bodily harm.” I.C. § 18-905(a) & (b). Section 19-2520 provides that any person convicted of aggravated assault, “who displayed, used, threatened, or attempted to use a firearm or other deadly weapon while committing or attempting to commit the crime, shall be sentenced to an extended term of imprisonment.” Thus, the standoff evidence that, after the incident, the police tried to contact Mr. Sams and Mr. Sams refused to communicate with the officers does not tend to establish any of the factual elements of the underlying offenses.

As previously noted, the standoff occurred in the hours after the incident. Subsequent acts come under the purview of Rule 404(b) as other acts. See *State v. Sheahan*, 139 Idaho 267, 279 (2003) (holding evidence a defendant removed plastic bags from his hands later on the day he was arrested for a shooting incident was admissible under Rule 404(b), because it could be inferred the defendant was trying to destroy evidence, which would be relevant to consciousness of guilt).

The State’s initial arguments and the district court’s initial analysis further indicate the standoff evidence was Rule 404(b) evidence of other acts. The State at first argued

the standoff evidence was admissible to show consciousness of guilt and identity. (Tr., p.110, L.16, p.111, L.5.) Idaho's appellate courts have recognized consciousness of guilt as a non-propensity purpose for the admission of other acts evidence under Rule 404(b). *State v. Ehrlick*, 158 Idaho 900, 917 (2015); *State v. Pokorney*, 149 Idaho 459, 463 (Ct. App. 2010). Rule 404(b) expressly lists identity as a non-propensity purpose. I.R.E. 404(b).

The district court then ruled the standoff evidence was admissible after conducting a full Rule 404(b) analysis. "Admissibility of evidence of other crimes, wrongs, or acts when offered for a permitted purpose is subject to a two-tiered analysis." *Grist*, 147 Idaho at 52. "First, the trial court must determine whether there is sufficient evidence to establish the other crime or wrong as fact." *Id.* "The trial court must also determine whether the fact of another crime or wrong, if established, would be relevant." *Id.* "Evidence of uncharged misconduct must be relevant to a material and disputed issue concerning the crime charged, other than propensity." *Id.* "Such evidence is only relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id.*

"Second, the trial court must engage in a balancing under I.R.E. 403 and determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence." *Id.* "This balancing is committed to the discretion of the trial judge." *Id.* "The trial court must determine each of these considerations of admissibility on a case-by-case basis." *Id.*

The district court ruled the standoff evidence was admissible after conducting the above two-tiered analysis under Rule 404(b). The district court first decided "there's

sufficient facts to find this did exist. While [Mr. Sams'] not charged with resisting and obstructing, it could be perceived as another wrong or act under Rule 404." (Tr., p.113, Ls.17-21.) The district court next concluded the standoff evidence was relevant for a non-propensity purpose, namely "it is admissible for another purpose including the identity or the absence of mistake or accident in this particular fact given the state's' offer of proof." (Tr., p.113, L.22 – p.114, L.1.) Rule 404(b) lists identity and absence of mistake or accident as non-propensity purposes for admitting other acts evidence. I.R.E. 404(b).

The district court then went to the second tier of the Rule 404(b) inquiry, determining the standoff evidence was admissible under Rule 403 because it was not "unduly prejudicial to the defendant." (Tr., p.114, Ls.2-3.) The district court further stated, "[i]t is part and parcel of the offense, and he had not invoked his right to remain silent, so I don't believe it is commenting on his right to silence." (Tr., p.114, Ls.4-6.) Thus, the district court initially ruled the standoff evidence was admissible after conducting the two-tiered analysis for admissibility of other acts evidence under Rule 404(b). In sum, the standoff evidence was evidence of other acts subject to the strictures of Rule 404(b).

D. The Standoff Evidence Was Inadmissible Because The State Failed To Serve Notice

Mr. Sams asserts the standoff evidence was inadmissible because the State failed to serve notice. Under Rule 404(b), the prosecution in a criminal case "shall file and serve notice reasonably in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it

intends to introduce at trial.” I.R.E. 404(b). The Idaho Supreme Court has held that “compliance with I.R.E. 404(b) is mandatory and a condition precedent to admission of other acts evidence.” *State v. Sheldon*, 145 Idaho 225, 230 (2008). The *Sheldon* Court held that, “[b]ecause the State failed to comply with the notice provisions of I.R.E. 404(b),” other acts evidence against a defendant was “inadmissible.” *Id.*

Here, the State failed to serve notice as required by Rule 404(b). The district court recognized “[t]here was not an intent to introduce 404(b) evidence, which is actually required under the statute if it’s offered under 404(b).” (Tr., p.118, Ls.20-22.)

Further, the district court excused the State’s failure to serve notice not because of good cause shown under Rule 404(b), but because the district court determined the standoff evidence was not Rule 404(b) evidence. (See Tr., p.119, Ls.2-15.) Thus, the State did not serve notice of the standoff evidence, and the district court did not excuse pretrial notice on good cause shown. Because the State failed to comply with the notice provisions of Rule 404(b), the standoff evidence was inadmissible. See *Sheldon*, 145 Idaho at 230.

E. The District Court’s Ultimate Determination That The Standoff Evidence Was Not Rule 404(b) Evidence Was Arbitrary And Outside The Boundaries Of The District Court’s Discretion

By determining the standoff evidence was admissible because it was not Rule 404(b) evidence, the district court contradicted its earlier ruling that the evidence was Rule 404(b) evidence. Mr. Sams asserts the district court’s ultimate determination that the standoff evidence was not Rule 404(b) evidence was arbitrary, and therefore outside the boundaries of the district court’s discretion.

Only after Mr. Sams pointed out the State's failure to serve notice did the district court determine the standoff evidence was not Rule 404(b) evidence. The contradictions started with the State's arguments. The State argued the evidence was not Rule 404(b) evidence because "it's all part and parcel to this incident," (Tr., p.117, Ls.5-6), counter to the State's previous contention that the standoff evidence was admissible as other acts evidence for the non-propensity purposes of consciousness of guilt and identity. (See Tr., p.110, L.16 – p.111, L.5.)

The district court's explanation of why the standoff evidence was not Rule 404(b) evidence at first appeared to embrace the non-propensity purpose of consciousness of guilt for admitting other acts evidence: "I do agree that there is certain components of the delay in coming out of the residence, which are consciousness of guilt are parcel to the facts of the crime." (See Tr., p.119, Ls.2-5.) The district court further indicated the standoff evidence was other acts evidence by observing Mr. Sams "clearly could have been charged with resisting and obstructing. He's not charged. The State had the opportunity to charge that conduct, and they did not." (See Tr., p.119, Ls.5-8.)

However, the district court's ultimate determination that the standoff evidence was not Rule 404(b) evidence contradicted its earlier ruling that the evidence was Rule 404(b) evidence. The district court determined the standoff evidence that the police "made numerous attempts to contact [Mr. Sams], he did not answer, and, ultimately, they threw a phone through the window to try and make contact with him" was admissible "because I don't think that that is character or 404(b) evidence for which they did not present notice." (Tr., p.119, Ls.9-15.)

But the district court's earlier ruling was not so limited. The State's offer of proof included evidence that the police made multiple attempts to contact Mr. Sams and threw a phone through a window to contact him. (Tr., p.111, L.23 – p.112, L.5.) After considering the State's offer of proof, the district court ruled "under Rule 404(b) that this information is, not just to prove the character of Mr. Sams, but it is admissible for another purpose including the identity or the absence of mistake or accident in this particular fact given the state's offer of proof." (Tr., p.113, L.22 – p.114, L.1.) Thus, the district court's earlier ruling encompassed all the standoff evidence, including the evidence the district court later determined was not Rule 404(b) evidence.

The district court's ultimate determination was arbitrary and therefore outside the boundaries of the district court's discretion. The district court's ruling that the standoff evidence was admissible as Rule 404(b) evidence stood until the court was presented with the State's failure to serve notice, which would render the evidence inadmissible. See *Sheldon*, 145 Idaho at 230. The district court then determined the evidence was admissible because it was not Rule 404(b) evidence. The district court's flip-flopping on whether the standoff evidence was Rule 404(b) evidence was arbitrary, and thus outside the boundaries of the district court's discretion.

Because the district court's ultimate determination that the standoff evidence was not Rule 404(b) evidence was outside the boundaries of the district court's discretion, the district court abused its discretion when it admitted the standoff evidence. See *Hedger*, 115 Idaho at 600. The standoff evidence was inadmissible under Rule 404(b) because the State failed to serve notice. See *Sheldon*, 145 Idaho at 230.

F. The State Will Be Unable To Prove That The District Court's Error Was Harmless Beyond A Reasonable Doubt

Mr. Sams asserts his judgment of conviction should be vacated and the case should be remanded because the State will be unable to prove the district court's in admitting the standoff evidence was harmless beyond a reasonable doubt.

Where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). See *State v. Perry*, 150 Idaho 209, 227 (2010). "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Sharp*, 101 Idaho 498, 507 (1980) (citing *Chapman*, 386 U.S. at 24).

The State will be unable to prove that the district court's abuse of discretion was harmless beyond a reasonable doubt. Putting the standoff evidence aside, the State's case was weak. The State's case largely rested on the testimony of the complaining witness, Mr. Ohlsson. (See, e.g., Tr., p.343, Ls.15-16 (State's contention in closing argument, on "[w]hat do know about what happened? We have the testimony of Mr. Ohlsson.") Mr. Ohlsson was thoroughly impeached over the course of the trial. As discussed above, while Mr. Ohlsson testified he did not have any sexual contact with Mr. Sams (Tr., p.159, Ls.8-12), Officer Linn testified Mr. Ohlsson told him there was some sexual contact. (Tr., p.227, L.22 – p.228, L.8.) Further, Mr. Ohlsson was impeached on what he wrote in his written statement about the incident (see Tr., p.160, L.23 – p.161, L.22), and on how his trial testimony on the order of events differed from

the order of events he testified to at the preliminary hearing (see Tr., p.164, L.2 – p.169, L.15.) Mr. Ohlsson was even impeached on the nature of the Grindr app he used to contact Mr. Sams. (*Compare* Tr., p.156, L.21 – p.157, L.9 (Mr. Ohlsson denying Grindr is a “hookup site”), *with* Tr., p.263, L.11 – p.264, L.2 (Mr. Sams explaining Grindr is primarily used for hookups).)

Considering the weakness of the State’s case, it cannot be said the error in admitting the standoff evidence did not contribute to Mr. Sams’ conviction for disturbing the peace. Even though the jury acquitted Mr. Sams on the original aggravated assault charge and the lesser-included assault charge, there was still a reasonable possibility the standoff evidence contributed to the conviction. See *State v. Lilly*, 142 Idaho 70, 73-74 (Ct. App. 2005) (holding that a district court’s error in instructing a jury on the elements of felony domestic violence was not harmless, “mindful that the jury did not entirely accept the state’s evidence presented at trial” because the jury acquitted the defendant on a kidnapping charge).

The State will be unable to prove the district court’s in admitting the standoff evidence was harmless beyond a reasonable doubt. Thus, Mr. Sams’ judgment of conviction should be vacated and the case should be remanded.

CONCLUSION

For the above reasons, Mr. Sams respectfully requests this Court vacate his judgment of conviction and remand his case to the district court.

DATED this 29th day of February, 2016.

_____/s/
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of February, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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_____/s/_____
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BPM/eas